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Utah Supreme Court

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IN THE SUPREME COURT

of the

STATE OF UTAH

FILED
N 1 6 1961
Clerk, Supreme Court, Utah

FRED R. LAW and
GERTRUDE R. LAW,
husband and wife,
Plaintiffs and Respondents,

vs.

UINTA OIL REFINING
COMPANY, a corporation, and
UTAH COOPERATIVE
ASSOCIATION, a corporation,
Defendants and Appellants.

Case No. 9333

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

FACTS

I propose the following corrections and additions to the factual narration of appellants:

1. Five or six days prior to the explosion appellants asked respondents if their tank "could hold a partial load of gasoline" and respondents answered that it "could not at that time" (Tr. 22) Respondents' tank did have some gasoline in it immediately prior to commencement of unloading operations (Tr. 42), and it was not measured on the occasion

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of the unloading (Tr. 76). This is additional evidence of appellants' negligence with respect to the escape of the gasoline.

2. Appellants state that Burdick "instructed Webb how to connect the hoses and *unload the gasoline*" (Brief 3). This implies that Burdick was in charge of the unloading operations which is not true. Actually what Burdick did was to show Webb the location of the unloading devices and Webb thereupon backed the trailer into position and made the connections. Webb asked Burdick to open the valve to respondents' stationary tank which Burdick did (Tr. 77). Burdick went back to his service station duties (Tr. 78) and Webb proceeded with his unloading operations.

3. In summarizing the testimony of the witnesses with respect to the physical layout of the storage building appellants say "It was loosely put together" (Brief 5). Even more significant insofar as effect of the prevailing breeze in moving vapors away from the interior of the storage house is the fact that at the time and place in question the north window (which was immediately north of the tank and motor), the two small doors (one of which was immediately west of the tank and motor), the one large garage door and the stairway exit were all wide open (Tr. 15, 16, 17, 21, 104).

4. The existence of the vent pipe extension

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which protruded through the roof and which served the dual purpose of venting the tank and as a conduit through which the gasoline in the tank was measured was confirmed by the testimony of Mrs. Law (Tr. 19, 20, 23, 41, 43); Burdick (Tr. 73, 74); and by Gilson (Tr. 104, 105). The exact manner in which this extension pipe was connected to the vent stub is not in evidence.

5. Mr. Leavitt, as appellants report (Brief, 12), stated that the custom in the oil industry was for the truck operator to remain in the immediate area of the tank truck while it was dumping (Tr. 148) and he also stated on cross examination that the truck operator should "remain with the load until it was dumped" (Tr. 150). It is not true as appellants narrate (Brief, 12) that Leavitt said "there was no custom with respect to what the operator of the service station does when deliveries are made". On this subject Leavitt answered:

> "No, sir we are, as far as the delivery person, the recipient there is no obligation for him to remain close to the delivery of the gas." (Tr. 149)

6. Olsen's testimony that prior to the explosion gasoline had flowed a distance of some 350 feet along the gutter near the highway as set forth by appellants (Brief, 4) is confirmed by the testimony of Mrs. Law, Shaw and Burdick each of whom testified to the wall or bank of fire in the

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gutter which compelled them to run south in the neighborhood of the bill board in order to cross on to the highway (Tr. 29, 51, 64, 66, 73).

7. The jury in this case was presented conflicting testimony by two explosion experts, Dr. Cook of the University of Utah and Dr. Bryner of the Brigham Young University. The "five very significant facts" referred to by appellants (Brief, 9-10) are handled as follows by the experts:

(1) *The place of the initial explosion:*

Dr. Cook says it was in the region of the storage tank (Tr. 125-126). Dr. Bryner says the explosion was both inside and outside the storage building and ignition was almost instantaneous (Tr. 163, 166, 172, 173). Dr. Bryner did not "reverse his direct testimony" with respect to place of initial explosion as appellants assert (Brief, 13). As support for his conclusion that the explosion was both within and without the storage building Dr. Bryner called attention to the photographs in evidence which showed the cement block wall still intact and he stated that had the explosion been only on the inside as contended by Dr. Cook the cement block wall would have been blown over (Tr. 163). Dr. Cook did not explain this phenomenon.

Dr. Cook cites the inward bending of the

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storage tank as evidence that the explosion occurred inside the storage building (Tr. 129). Dr. Bryner replies that the inward bending of the tank was the result of the warping of metal incident to the application of water to the heated metal tank (Tr. 162-163).

(2) *The vent pipe extension:*

Dr. Cook concluded there was no such extension pipe connected because the female threads on the vent stub were not sheared (Tr. 127-128). Dr. Bryner countered with the observation that although these threads were not sheared the vent pipe extension as described by the witnesses was susceptible of connection to the vent stub either (a) by standing a larger size vent pipe over the stub or (b) by putting a "metal cap around there and clamp it on" (Tr. 168).

Dr. Cook found a metal flex pipe lying on top of the storage tank with a connection size which chanced to fit the vent stub and says, "So I assume, of course, that this was intended to be used in there as a vent pipe, but it was just laying on top of the tank on my examination" (Tr. 128). This assumption was erroneous. The extension pipe was a rigid pipe. The flex pipe he found was used for unloading gasoline and was never intended or

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used as the vent pipe extension (Tr. 52-53).

(3) *The bulging of the top of the storage tank:*

Dr. Cook says the top of the storage tank had been bulged up and outward, indicating an explosion had occurred inside the tank which was less powerful than the explosion which occurred outside the tank (Tr. 128-129). This we do not deny but Dr. Bryner made the more helpful observation from the photograph Exhibit P-2 that the gasoline vapors burned jet-like out of the vent pipe for some time before there was an explosion in the tank (Tr. 161-162) and that it was a secondary explosion which burst the tank (Tr. 162).

(4) *The storage house electric motor:*

Dr. Cook says this motor would emit sparks (Tr. 129). Dr. Bryner says sparks would be emitted only on starting, not while running, and we submit that a fair construction of his testimony (Tr. 169, 188) is to the effect that the motor would not spark on being stopped. Dr. Bryner further stated that "there's a possibility that a motor, moving machinery like this, might ignite a fire, might ignite gasoline. Anybody would take that, even the best induction motors could do it" (Tr. 183).

This court's attention is directed to Ex-

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hibit D-25, appellants' enlarged photograph of the motor, exhibited to the jury, which clearly shows even the grill work on the motor to be undamaged. That photograph is persuasive evidence that the explosive spark wasn't emitted from that motor.

(5) *The discoloration on the interior of the corrugated sheet metal forming the wall next to the storage tank:*

This, contends Dr. Cook, tends to prove the initial explosion was inside the storage room (Tr. 129). Not so, opines Dr. Bryner: A more likely explanation is that that particular metal was not blown away but stood and was burned and discolored on the inside from the ensuing fire (Tr. 164).

Let us place in juxtaposition some other relevant testimony of the experts:

(6) *Whether expelled vapors resulting from the filling of the tank likely would have "pooled" near the motor?*

Yes, says Dr. Cook, because there would be "very little ventilation on that one side" [north side of tank] (Tr. 130). He did not discover evidence that there was an open window on the north side (Tr. 132).

No, says Dr. Bryner, because there were numerous openings in the storage house, all enumerated in the hypothetical questions, in-

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cluding an open window and an open door near the north side of the tank (Tr. 154) which openings would permit the prevailing wind to blow vapors away, and moreover

> "the heat from the sun would tend to heat the air all around underneath that and that air would tend to move outward. Upward, and then cold air would come in from the bottom. The lower areas and rise in that direction. Up toward the heat. The air probably from the North side or any place where it could come in there would tend to go upward. From the heat. Radiation." (Tr. 159)

Dr. Cook on cross examination also admits "If standpipe was up, as I understand you to state now, and there was a breeze, why that would take, of course, the fumes away" (Tr. 141). The photographs, observes Dr. Bryner, establish that there was a breeze (Tr. 159) and other witnesses testified as to existence of the standpipe (supra).

(7) *The physical fact of the presence of the gasoline which escaped and ran in front of storage house to the gutter and from thence some 350 feet southward:*

At the time he made his investigation and arrived at his conclusion Dr. Cook did not know that gasoline had escaped and that fact does not appear to have been accepted by him or considered by him at the time he testified.

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Dr. Bryner on the contrary did take into account this "most significant" seventh fact as established by the evidence in arriving at his conclusions and stated on cross examination that the gasoline could have escaped by reason of (a) a leaky fitting, (b) a poor connection on the pump or (c) an overflow of the tank (Tr. 177, 179).

As to further confusion in and testimony reversals on the part of Dr. Cook I call to the Court his cross examination (Tr. 134-141).

ARGUMENT

APPELLANTS' POINTS I AND II — DENIAL OF APPELLANTS' MOTIONS TO DISMISS AND TO DIRECT VERDICT.

Points I and II enumerated by appellants and their argument in support thereof boil down to the question of whether respondents established a prima facie case of negligence so that the case was properly submitted to the jury. Specifically appellants argue there were no evidentiary facts tending to establish negligence on the part of appellants and that it was left to the jury to speculate with respect thereto.

This is not so. The following facts were clearly established by the proof:

1. The truck driver Webb had the duty to re-

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main at all times within such proximity of the unloading operations that he could give immediate attention to any failure in the instrumentalities involved.

2. After the unloading operations commenced Webb did not remain with the truck but went to a nearby cafe.

3. A large quantity of gasoline escaped. The quantity of this gasoline was sufficient that it flooded across the sloping area in front of the storage house, reached the highway gutter in front of the service station and flowed down this gutter approximately 350 feet. *This gasoline so flowed before the explosion.* It was seen by Olsen who was passing along the highway immediately prior to the fire (Tr. 83).

The jury was entitled to conclude that Webb was not present while this large quantity of gasoline was escaping because had he been there he would have stopped the unloading operation or alerted the service station attendants for help, or would have taken other safety measures such as application of water to wash away the dangerous gasoline (Tr. 85).

From the evidence adduced the jury was also entitled to conclude that after Webb came from the cafe he did close the top hatch on his truck and

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shut off the fire valve; that all of the gas was unloaded by use of the electric motor and pumping facilities and that the explosion occured thereafter. See testimony of Hatch (Tr. 119, 120). Had these things not been done there would have been a fire and explosion in the tanker itself which sat right adjacent to the conflagration as the photographs disclose. There was only minor damage to the tires and bumper of the tank wagon (Tr. 31, 80, 81). The spark originated after the gasoline was completely unloaded.

4. The fumes which made the explosion and fire possible did not come from the storage vent stub or vent pipe but arose from this large quantity of escaping gasoline. This was the proximate cause of the explosion and fire. The collation of the statements of the experts hereinabove set forth, demonstrates that the jury possessed competent evidence from which it could and did conclude that the fatal vapor did not arise from the storage tank vent stub or vent pipe as contended by appellants.

An analysis of the fact situations in the "speculation and conjecture" cases cited by appellants when compared to the instant case readily demonstrates the distinguishing facts at hand. I have enumerated some of the evidentiary facts and permissible inferences in this case including the escape of the large quantity of vapor producing gasoline

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and the inescapable inference that during the course thereof the truck driver either was not present or if present was not paying attention to the operations and the escaping fluid. To paraphrase the statement from *Sumsion* vs. *Streator-Smith, Inc.*, 103 Utah 44, 132 P 2d 680, the evidence in this case does "more than merely raise a conjecture or show a probability". This Court stated in *Olsen* vs. *Warwood*, 123 Utah 111, 255 P 2d 725, 728, "that a jury may find any fact which must reasonably and of necessity flow from the other facts which are in evidence."

Appellants' argument (Brief, 20), in light of the evidentiary facts in this case, seems far-fetched indeed:

> "Other than the unfounded assumption of the trial court and jury it could just as well be assumed that the deceased driver was at the place of the unloading operation *and had no knowledge of any escaping gasoline or fumes*"!!

We have carefully read the other cases cited by appellants, namely, the poison bug case, *Spackman* vs. *Benefit Assn. of Ry Employees*, 97 Utah 91, 89 P 2d 490; the infra-red lamp case, *Jackson* vs. *Colstrom*, 116 Utah 295, 209 P 2d 566; the naturopathic case, *Forrest* vs. *Eason*, 123 Utah 610, 261 P 2d 178; the Weber County child case, *Alvarado* vs. *Tucker*, 2 Utah 2d 116, 268 P 2d 986;

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and the Pontiac mechanical defect case, *Price* vs. *Ashby's Inc.*, 354 P 2d 1064. We submit that the principles enunciated in those cases support our position.

By way of summary we repeat that respondents' proof as to the negligence of appellants rests, not upon speculation, but upon evidentiary facts and permissible deductions from such facts.

Having established the negligence of appellants in connection with the presence of the large quantity of flowing gasoline the law does not require that we establish the precise manner by which it escaped or by which it was ignited. In support of this position we submit to the court the following:

Defendants were professional handlers of gasoline and they knew that although gasoline itself will not burn — the vapors arising therefrom when mixed with air will burn and may become extremely dangerous. Justice Folland in *Vadner* vs. *Rozzelle*, 45 P 2d 561, 563, stated that the defendant in that case was "charged with knowledge that gasoline is highly volatile and will give off fumes or gasses that will ignite readily when in proximity to a fire or a flame."

The cases which I am about to cite stand for the proposition that it is not incumbent upon plaintiff to show the exact source of the spark or energy

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which results in fire or explosion if plaintiff has shown the negligence of defendant in connection with presence of the gas or vapors. Most of these cases are natural gas explosion cases but the principle underlying them is the same whether they involve fumes from gasoline or fumes from natural gas. None of the following is a res ipsa case.

Luengene vs. *Consumers Light, Heat & Power Company*, 86 Kan. 866, 133 P 1032, 1034. Gas had escaped and there was no evidence as to the source of the spark which ignited the fumes:

> "An instruction was asked to the effect that, in the absence of such evidence, the action must fail. This was refused, and an instruction was given to the effect that such evidence was not essential to a recovery, if the proof was otherwise sufficient, and the plaintiff himself was not negligent. This instruction and the refusal to give the one requested, are among the principal reasons urged for reversal of the judgment."

The judgment was affirmed and the court continues at page 1034:

> "In *Gas Co.* vs. *Carter*, 65 Kan. 565, 70 P. 635, it appeared that gas had been allowed to escape and accumulate in a cellar, and from some unknown cause exploded. Such an explosion was a natural and probable consequence which might reasonably have been foreseen; and the company which negligently permitted the gas to escape was held liable for the resulting damages. It was contended, as

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it is here, that a failure to prove how an accumulation of gas in a cellar became ignited was fatal to a recovery of damages, caused by its explosion. It was said [by the court] 'To this contention we do not agree' * * *".

Consumers Power Co. vs. *Nash*, 164 F (2d) 657, 658, 6 CCA 1947. This case arose in Michigan. Gas had escaped but the source of spark or energy igniting the gas was not established. The court decided:

> "If a generally injurious result should have been forseen as reasonably probable, the appellant was responsible for the injuries which followed, even though it could not have forseen the precise manner in which the explosive gasses might be vitalized. Reasonable apprehension of danger constitutes both the criterion of liability and of the casual relation between negligence and injury if there is no intervening efficient independent cause."

In *Gas Service Company* vs. *Payton*, 180 F (2d) 505 (1950) which arose in Missouri the Court stated that ordinarily a defendant is uder no obligation to inspect the receiving facilities,

> "But notwithstanding such ordinary rule all of the authorities hold that a gas company is to be held to the exercise of a high degree of care which is commensurate with the deadly and dangerous character of its product, and even though the defect is in appliances belonging to the consumer, if the gas company is notified of the escaping gas *its duty is to do something about it, either to repair or cause to be repaired the defect or to shut off the*

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flow of gas until repairs are made." (Quoting from *Barrickman* vs. *National Utilities Co.*, 191 SW 2d 265, 268).

It is true as just stated that neither a gas company nor a deliverer of gasoline is under duty to inspect, maintain or repair the facilities of the customer. The Minnesota Court in *Bellefuil* vs. *Willmar Gas Co.*, Minn. 1954, 66 NW (2d) 779, 783, after so observing speaks thus:

> "If, however, a gas company acquires, or ought reasonably to have acquired, knowledge of a dangerous condition, it is its duty to shut off the gas until the customer has his pipes, connections and appliances properly repaired".

Jeff vs. *Cottonwood Falls Gas Company*, Kan. 1947, 178 P 2d 992, 996:

> "If a dangerous condition was, or should have been discovered, it then became defendant's duty to shut off the gas until the customer could have his own pipes, connections and appliances properly repaired".

Even if the vapors negligently allowed to accumulate became ignited through "the effects of a third person's innocent, tortious or criminal act" the defendant is not protected from liability. *Restatement of the Law of Torts*, Vol. 2 p 1184, Sec. 439 and see filling station case of *Robert R. Walker, Inc.* vs. *Burgdorf*, (Texas 1952), 244 SW (2d) 506 where bystander deliberately threw a match into

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gasoline negligently allowed to accumulate on service station floor.

APPELLANTS POINT III — THE GIVING OF INSTRUCTION NO. 6 (R. 43).

Appellants have quoted this instruction in-toto. It is apparent from the facts reviewed and the principles and authorities above cited there is no error in this instruction. Both the fact situation and the instruction given in *Hooper* vs. *General Motors Corporation*, 123 Utah 515, 260 P 2d 549, distinguished that case as appellants' quotation therefrom demonstrates (Brief, 25). The error in the Hooper case stems from the erroneous instruction that the separation of the automobile rim and spider was "*no evidence* of the fact that they were defective". This negative instruction is radically different from the one given by Judge Keller.

It should not escape attention that instruction No. 3, which is referred to in this instruction No. 6, covers the matter of alleged contributory negligence of respondents — all in keeping with appellants' pleadings and theory of the case, including the issue of whether the vapors escaped from defective appliances of respondents and whether ignition came from the motor.

In order to find against defendants under instruction No. 6 the jury was first required to find non-negligence of the plaintiffs under instruction

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No. 3. This the jury did upon substantial evidence.

APPELLANTS' POINT IV — REFUSAL TO INSTRUCT ON PRESUMPTION OF DUE CARE.

I have carefully read the cases cited by appellants under this subdivision and feel that it would be presumptious on my part to presume to instruct this Honorable Court about "presumptions". I somehow get the impression from reading *Tuttle* vs. *P.I.E.*, 121 Utah 420, 242 P. 2d 764, and *Mecham* vs. *Allen*, 1 Utah 2d 79, 262 P 2d 285 that this Court has devoted some hours to the consideration of that subject.

These cases teach that the presumption of due care is a procedural one and that no instruction thereon should go to the jury if there is evidence from which the jury could conclude that defendant was negligent. The presumption has to do with plaintiffs' burden of moving forward.

We were not sitting on dead-center at the conclusion of respondents' evidence in this case. Appellants' requested instruction on due care would have been appropos *if* there had been (1) no evidence of failure of truck driver Hatch to measure the gasoline already in the storage tank before he started pumping the tank-load of gasoline into it, (2) no evidence of his leaving his tank wagon after the unloading operations began, (3) no evidence that the

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tank wagon was pumped dry and its valves and hatches closed before the explosion occured, (4) no evidence that as a result of the unloading operations gasoline of sufficient quantity escaped that it flooded the area and distance described by the witnesses,

and,

(5) if all we had before us was an unexplained explosion in the course of normal unloading operations with loss of life to the truck driver.

It is even more difficult for me to conceive the relevancy of the presumption of "right conduct" which attached to Mathesius in the fraud case of *Holland* vs. *Columbia Iron Mining Co.*, 4 Utah 2d 303, 293 P 2d 700, (Appellants' Brief 21).

APPELLANTS' POINT V — REFUSAL TO GIVE INSTRUCTION NO. 10.

This point has been substantially argued under Points I and II.

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CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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